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No. 06-1619

Supreme Court, U.S.
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In The

Supreme Court of the United States

GOOD NEWS EMPLOYEE ASSOCIATION, REGINA REDERFORD, ROBIN CHRISTY,

Petitioners,

v.

JOYCE M. HICKS, in her individual and official capacities as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland, ROBERT C. BOBB, in his individual and official capacities as City Manager of the City of Oakland,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE**

Pacific Justice Institute ("PJI") is a nonprofit corporation, operating under 501(c)(3) of the Internal Revenue Code, which engages, in part, in litigation affecting the public interest as it relates to the defense of speech, association, religious exercise, and the establishment clause. As such, PJI routinely represents the rights of people of faith and religious organizations when the above-described First Amendment rights are implicated. The case before the Court will have a profound impact on those whom PJI represents as well as this organization's ability to provide legal assistance. Thus, PJI has a strong interest in the outcome of this matter.

SUMMARY OF ARGUMENT

Amicus urges this Court to grant review and reverse the decision of the Ninth Circuit. This Court is presented with a straightforward question: Do public employees shed their freedom of speech at the water cooler? Respondents think so and the Ninth Circuit agrees. If the decision stands, public employees will be pushed to corners in cafeterias where their speech must be reduced to hushed whispers lest they upset the authorities' status quo.

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* The parties have consented to the filing of this brief.

Under Rule 37.6, *Amicus Curiae*, Pacific Justice Institute, and its counsel of record, Kevin T. Snider, hereby affirm that no counsel for any party authored this brief in whole or in part.

No person or entity, other than the *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Respondents silenced Petitioners due to one complaint from one employee stemming from Petitioners' promotion of "natural family, marriage and family values." This regime of censorship led one well-respected commentator to conclude that Respondents went too far, wielding "such unbridled power of prior restraint on speech in the name of protecting order and decorum that they . . . nullify the First Amendment by declaring that even the mild text of the GNEA flyer is inherently disruptive." George F. Will, *Speech Police, Riding High in Oakland*, WASH. POST, June 24, 2007, at B07. The Ninth Circuit endorsed this action, setting a chilling precedent. Allowing Respondents to penalize Petitioners for their viewpoints threatens constitutional rights of thousands of public employees across California and the western states who dare to come out of the closet to support and celebrate traditional families. As such, this petition should be granted.

ARGUMENT

I. Respondents engage in blatant viewpoint discrimination and subject GNEA members' freedom of speech to prior restraints.

Respondents' treatment of the First Amendment right to free speech evokes a scene towards the end of George Orwell's ANIMAL FARM where The Seven Commandments are reduced to a single phrase: "All animals are equal, but some animals are more equal than others." George Orwell, ANIMAL FARM 52 (1945 ed.). Respondents attempt to reduce Good News Employee Association ("GNEA") members' fundamental right to free speech to a single phrase which reads, "All ***perspectives*** are equal, but some ***perspectives*** are more equal than others." This

is antithetical to the law and history of a nation conceived in the "marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (U.S. 1967).

Despite their protestations to the contrary, Respondents deliberately distort the "marketplace of ideas" in favor of a particular viewpoint and levy a heavy toll on GNEA members' constitutional freedom of speech. It cannot reasonably be argued that the penalty imposed on GNEA members has any other basis than the expression of a viewpoint which is inconsistent with pro-homosexual orthodoxy. By removing a flyer and subjecting GNEA email communiqués to prior restraints and outright censorship, Respondents sanctioned an egregious deprivation of employees' fundamental right to speak freely on matters of public concern. Enforcers of ideological orthodoxy, Respondents hypocritically proclaim "tolerance" and "diversity." Ironically Respondents express intolerance that suffocates the vital marketplace of ideas which thrives on diverse points of view.

Respondents claim they do not completely suppress a form of speech since there are other avenues of communication open to GNEA members, principally email. But even this avenue is narrow, as it is "subject to certain editorial restrictions," in the words of the district court. *Good News Emple. Ass'n v. Hicks*, No C-03-3542 VRW, 2005 U.S. Dist. LEXIS 5270, at *21 (N.D. Cal. Feb. 14, 2005), *aff'd*, No. 05-15467, 2007 U.S. App. LEXIS 5514 (9th Cir. Mar. 5, 2007). Conditional access to a public forum differentially applied only against GNEA constitutes a prior restraint and violates the Equal Protection Clause of the Fourteenth Amendment.

A. Respondents have engaged in viewpoint discrimination by excluding perspectives from one group deemed unpopular while allowing the unfettered expression of markedly different views from other groups.

This Court has stressed "[t]he public interest in having free and unhindered debate on matters of public importance, the ***core value*** of the Free Speech Clause of the First Amendment." *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968) (emphasis added). It follows that government may not permit speech that expresses one viewpoint yet prohibit speech that expresses the opposite viewpoint; such conduct is presumptively unconstitutional. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). The Ninth Circuit has utterly failed to start with the initial premise that censoring one side of a debate is presumptively unconstitutional. This novel approach by this Circuit is inherently dangerous.

There is "'an equality of status in the field of ideas,'[1] and government must afford all points of view an equal opportunity to be heard." *Police Dept. of City of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). Thus, once government opens a forum for the presentation of all views on an issue, it may not exclude groups expressing views on that issue from a religious standpoint. *Rosenberger*, 515 U.S. at 831; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393 (1993). In fact, when the government does not target subject matter for exclusion but particular views taken by speakers on a subject, "the violation of the

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[1] A. Meiklejohn, *Political Freedom: The Constitutional Powers of The People* 27 (1948).

First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. In contrast, the Ninth Circuit's dismissive framework, if it can be called that, poses a significant threat to speech.

Respondents' actions present this Court with an illustrative example of just such a blatant First Amendment violation. GNEA members seek to participate in constitutionally protected First Amendment discourse as members of the public with other members who adhere to distinctly different views. It is precisely this type of discourse, this "marketplace of ideas" that creates an educated citizenry, essential to self-governance and informed decision making. *See Pickering*, 391 U.S. at 571-572. But Respondents create an artificial marketplace where the only ideas exchanged are those deemed acceptable and where views from a religious standpoint[2] by members of GNEA regarding the same subject matter are excluded or are subject to "editorial restrictions." This is viewpoint discrimination in its most insidious form.

B. Respondents have imposed a prior restraint by prospectively enacting a policy to muzzle disfavored speech and subjecting it to "editorial restrictions" determined by city officials, resulting in unbridled discretion.

Improper restraints on communication vary in form and degree, but all restrict the dissemination of ideas. 16A AM. JUR. 2D *Constitutional Law* § 454 (2006). A

[2] The flyer posted by GNEA explains that it is a forum created "*for people of Faith* to express their views on contemporary issues of the day." (emphasis added). The religious character of the views expressed in the flyer is unmistakable.

governmental regulation that prohibits or limits the future dissemination of constitutionally protected speech constitutes a prior restraint. Similarly, a prior restraint occurs when speech is conditioned upon the prior approval of a public official, particularly when this official is afforded unbridled discretion in the decision making process, regardless how frequently such discretion is employed. "It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very ***existence*** that constitutes the danger to freedom of discussion." *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940) (emphasis added). In fact, a system of prior restraint "can only avoid constitutional infirmity if it takes place under procedural safeguards to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *See also, Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

Rather than recognize the equal status enjoyed by all participants in the field of ideas, Respondents implement prior restraints on free speech created specifically for and applied exclusively against GNEA and its members. GNEA members posted a flyer on their employee bulletin board promoting the group's desire to discuss "the Natural Family, Marriage and Family Values." *Good News*, 2005 U.S. Dist. LEXIS 5270, at *2. The flyer was distributed after other employees' groups, including those advocating homosexual rights – had advertised their political views and activities on the city's email system and bulletin board. *Id.* Some weeks later, Respondents developed and distributed Administrative Instruction 71 ("AI 71"). *Id.* While Respondent Hicks claims AI 71 predated the flyer, the letter accompanying the policy spells out the animus towards GNEA behind AI 71's promulgation:

> [The City] ha[s] recently had incidents . . . where staff has inappropriately posted printed materials that are in violation of [the policy]. Specifically flyers were placed in public view which contained statements of a ***homophobic nature*** and were determined to promote ***sexual orientation based harassment*** . . . Failure to comply [. . .] will include ***disciplinary action up to and including termination.***

Good News, 2005 U.S. Dist. LEXIS 5270, at *8 (emphasis added). Respondents enacted AI 71 and issued the accompanying letter to unlawfully prohibit future dissemination of GNEA flyers and to limit Petitioners' constitutionally protected speech in future email communiqués. Indeed, access to the citywide email system was conditioned upon prior approval of a public official who would ensure that Petitioner Regina Rederford had removed "verbiage that could be offensive to gay people." *Good News,* 2005 U.S. Dist. LEXIS 5270 at *6. Setting aside concerns about the legitimacy of such a standard, the record reflects ***no*** internal appeal process for Ms. Rederford and other members of GNEA to challenge a public official's determination. In fact, there is nothing in the record to indicate the existence of any guidelines that might cast at least a semblance of objectivity in this decision making process. Under the status quo, public officials in the Community and Economic Development Agency in the City of Oakland enjoy unbridled discretion while adversely affected public employees are without recourse.

Where a system of prior restraint is found it "can only avoid constitutional infirmity if it takes place under procedural safeguards to obviate the dangers of a censorship system." *Freedman v. Maryland,* 380 U.S. 51, 58 (1965); *See also, Southeastern Promotions, Ltd. v. Conrad,*

420 U.S. 546 (1975). The district court refers to alternative channels of communication left open to GNEA members as if this were sufficient, without more, to cure Respondents' egregious wrong. *Good News,* 2005 U.S. Dist. LEXIS 5270 at *21-22. As noted, even where a government policy only limits the manner of expression rather than the initial right to communicate, a prior restraint may still be found. Any and all of the necessary procedural safeguards to resuscitate Respondents' draconian policies are conspicuously absent in the record.

"It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very ***existence*** that constitutes the danger to freedom of discussion." *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940) (emphasis added). The district court noted that Respondents have both moved on to other jobs and there is no evidence that their successors "would take the same view of the application of AI 71." *Good News,* 2005 U.S. Dist. LEXIS 5270 at *29. Though current public officials in the City of Oakland may choose to allow constitutionally protected speech, this is beside the point. They may choose to adhere to First Amendment considerations or they may follow their predecessors' path and adjust their actions to accommodate the vacillating winds of political correctness. This choice without constraints underscores the procedural morass created by Respondents' policies.

II. Respondents' position wilts under *Pickering* and its progeny, which weigh heavily in GNEA members' favor.

Citizens cannot be deprived of their fundamental rights simply because they work for the government. *Connick v. Myers*, 461 U.S. 138 (1983). Thus, a State

cannot condition public employment on a basis that infringes upon the employee's constitutionally protected freedom of speech. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Perry v. Sindermann*, 408 U.S. 593 (1972). Whether an employee's speech is constitutionally protected is determined by a two-part test articulated by this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The *Pickering* test asks: (1) whether the speech addresses a matter of public concern, and (2) whether the interest of the employee as a citizen, in commenting on matters of public concern, outweighs the employer's interest in promoting the efficiency of the public services it performs. *Pickering,* 391 U.S. at 568. Thus, speech is unprotected only if its value – as measured by the employee's and the public's interests – is outweighed by the government's interest in effective and efficient provision of services. *Watters v. City of Philadelphia*, 55 F.3d 886, 895 (3d Cir. 1995).

As will be demonstrated below, Respondents' purported interest in the efficiency of its public services and a harmonious workplace are powerfully outweighed by GNEA members' interest in free speech and the protection afforded by the Constitution. The Ninth Circuit rubber-stamped the district court's token attempt at *Pickering* balancing resulting in the sanction of an unconscionable abrogation of GNEA members' First Amendment freedom of speech. As such, *Amicus* urges this Court to revive constitutional protection of Petitioners' speech.

A. GNEA members' speech deals with matters of public concern.

The First Amendment protects discourse between members of the public on matters of public concern.

Connick, 461 U.S. at 138. Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. *Id.* at 146. Furthermore, the place where the speech occurs is irrelevant. *See Rankin v. McPherson*, 483 U.S. 378, 388-392 (1987) (holding public employee's discharge violated First Amendment when based on comment by employee as private citizen on a matter of public concern made at work). The district court determined that the message in GNEA's flyer related to a matter of public concern and noted that Respondents did not dispute this conclusion.

B. The *Pickering* balancing test weighs heavily in GNEA's favor.

Because GNEA's flyer addressed a matter of public concern, *Pickering* mandates balancing of GNEA members' interest in expressing their views against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568. In performing this balancing this Court has considered (1) whether the statement impairs discipline by superiors or harmony among co-workers, (2) has a detrimental impact on close working relationships where personal loyalty and confidence are necessary, or (3) impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. *Id.* at 570-573.

This Court in *Pickering* emphasized "the public interest in having a ***free*** and ***unhindered*** debate on matters of public importance." *Id.* at 573 (emphasis added). This is particularly true where such debate is consistent with a forum's purpose. *See Burnham v. Ianni,*

119 F.3d 668, 679 (8th Cir. 1997) (photo presentation in library display case used to communicate matters of general interest found to be within the forum's purpose). Here, Respondents opened a public forum for the discussion of social, political and other issues of public concern. As previously noted, other employees' groups – including those advocating homosexual rights – had advertised their political views and activities on the city's email system and bulletin board. But when GNEA members attempted to advertise views and activities covering subject matter within the forum's purpose, an open forum was now suddenly closed (in the case of the bulletin board) or limited to viewpoint-based prior restraints (in the case of the email system). The City's message came through loud and clear: "All perspectives are equal, but some perspectives are more equal than others."

In the district court's words, "Workplace disruption is the touchstone of the employer's interest in the Pickering balance." *Good News,* 2005 U.S. Dist. LEXIS 5270, at *22. Yet there is no evidence that GNEA's flyer interfered with the effective functioning of the office. Indeed, Respondents present no evidence that GNEA's flyer disturbed anyone aside from one lesbian employee. As *Rankin* proves, the fact that co-workers become aware of the statements and are upset by them is an insufficient nexus to claim that the "smooth functioning" of the office has been compromised. Here, the so-called "disruption" is so tenuous, so unsubstantiated that even the district court termed it "friction," *id.* at *25, and "a *Pickering* disruption writ small." *Id.* at *23. The retaliation against Ms. Rederford and other GNEA members was not motivated by any legitimate desire to preserve the smooth functioning of the office; rather, Respondents stifled GNEA members' speech

based on its content absent any real showing of workplace dissonance.

The fact that the flyer's message may have taken an unpopular side of a national debate is insufficient to punish it. In *Rankin,* the government employee who brought suit had been fired after expressing approval of the attempt on President Reagan's life. *Rankin v. McPherson*, 483 U.S. 378 (1987). While her statement could be viewed as impairing harmony in the workplace, this Court held in favor of the employee, stating:

> "The burden of caution employees bear with respect to the words they speak will vary with the extent of ***authority*** and ***public accountability*** the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or ***public contact*** role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390-391 (emphasis added).

In the instant case, Ms. Rederford's role as a city employee entailed neither authority nor public accountability. Nor did she serve any confidential, policymaking, or public contact role. Thus, any tension Jennings felt as a result of her interaction with Rederford does not even approximate the tension tolerated by this Court in *Rankin*.

In *Burnham*, the Eighth Circuit recalled the general rule that "the public expression of ideas may ***not*** be prohibited merely because the ideas are themselves offensive to some of the hearers." *Burnham*, 119 F.3d at 678 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Only one employee complained in *Burnham* after viewing a library display case; the Eighth Circuit found this

insufficient to establish an "ambiance of fear" on the school campus. *Id.* at 679. Here, only one employee – Jennings – complained after viewing GNEA's flyer. *Good News,* 2005 U.S. Dist. LEXIS 5270, at *5. Jennings had initiated discussions with Ms. Rederford, after which she reportedly felt scared. *Id.* In short, Jennings initiated interaction with Ms. Rederford for a protracted period of time, encountered viewpoints she did not like, and filed a complaint. City officials briefly investigated the matter and promptly removed the flyer based on this complaint alone. *Id.*

As the *Burnham* court found, so should this Court conclude: Upholding the government's approach to the First Amendment "would permit the suppression of too much speech on arbitrary and capricious grounds." *Burnham*, 119 F.3d at 680. No less arbitrary and capricious grounds exist in the instant case. The Ninth Circuit merely avers that GNEA's speech adversely affected the efficiency of the City's operations and substantially disrupted the work environment without presenting evidence to support this bald assertion. Making matters worse, the Ninth Circuit approvingly quotes the district court's evaluation of GNEA members' speech interest as "vanishingly small." *Good News Emple. Ass'n v. Hicks*, No. 05-15467, 2007 U.S. App. LEXIS 5514, at *5 (9th Cir. Mar. 5, 2007), quoting *Good News,* 2005 U.S. Dist. LEXIS 5270, at *9. Proceeding to balance a baseless assertion of workplace disruption against a speech interest recognized by this Court as a core value of the First Amendment, the Ninth Circuit arbitrarily favors the former while overlooking the latter. If the holding stands, municipalities across the state could rely on arbitrary and capricious grounds to suppress advocacy of any matter of

public concern considered contributive to inefficiency and disharmony in the workplace.

C. The lower court decisions in this case express tacit approval of a heckler's veto in the public employee speech arena and encourage further censorship.

The government's ostensible concern with efficiency and harmony provides parties disagreeing with GNEA's speech a "heckler's veto." *See Terminiello v. Chicago*, 337 U.S. 1 (1949). The district court couched its implicit approval of this veto in terms of "maintaining a reasonably harmonious workplace in the face of strongly held opposing beliefs." *Good News,* 2005 U.S. Dist. LEXIS 5270, at *25. But the court neglected to acknowledge that Respondents created a public forum for the free discussion of inherently contentious and divisive political and social issues and now attempt to defend their discriminatory treatment against GNEA as requisite to maintain harmony. Respondents submit no evidence of an employee morale crisis and they fail to provide one scintilla of proof that office efficiency has been adversely affected. Instead, Respondents base their entire claim of discord in the office upon one complaint from one employee. *Amicus* can hardly envision a clearer example of a heckler's veto.

CONCLUSION

The governing authorities in Orwell's ANIMAL FARM claimed absolute power and abused it absolutely, ultimately reducing their governing document to a single

phrase purporting to afford equality but in reality accomplishing anything but that. Respondents do the same. Effectively claiming absolute power, they seek to reduce First Amendment freedom of speech to a cheap version of its true self, divested of any import and malleable to ever-changing purposes. GNEA members' freedom of speech is protected by the First Amendment to our Nation's Constitution, yet Respondents categorically deny this freedom based on nebulous notions of political correctness. The punishment levied against GNEA and its members by Respondents is wholly indefensible. Indeed, Respondents' action survives only if they are afforded absolute power to smother employee speech. For the foregoing reasons, *Amicus* urges this Court to right this deplorable wrong and accept the petition for writ of certiorari.

Dated: July 5, 2007

Respectfully submitted,

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